

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BUENA VISTA, LLC,

Plaintiff,

v.

NEW RESOURCE BANK, a California  
corporation; FERGUSON & BREWER  
INVESTMENT COMPANY, a California  
corporation; MARCUS & MILLICHAP  
COMPANY, a California  
corporation; and DOE 1 through  
DOE 20, inclusive,

Defendants.

No. C 10-01502 CW

ORDER GRANTING  
DEFENDANTS'  
MOTIONS TO DISMISS  
WITH PREJUDICE  
(Docket Nos. 46,  
50 & 51)

Defendants New Resource Bank, Ferguson & Brewer Investment Company, and Marcus & Millichap Company move under Federal Rules of Civil Procedure 12(b)(6) and 9(b) to dismiss Plaintiff Buena Vista, LLC's claims. Having considered all of the parties' papers, the Court GRANTS Defendants' motions.

BACKGROUND

This action arises from a loan that Plaintiff Buena Vista received to fund the construction of a residential project in Martinez, California. On October 3, 2006, Buena Vista executed a Construction Loan Agreement with New Resource Bank, borrowing

1 \$2,718,000 to build Villa Del Sol, an ecologically friendly  
2 townhouse development. Originally Buena Vista intended to sell  
3 the units following completion of construction, but the decline in  
4 the housing market thwarted its plans. Buena Vista faced  
5 increasing financial difficulty, requiring it to seek extensions  
6 on its construction loan in December, 2007, and April, 2008. On  
7 December 9, 2008, New Resource Bank converted Buena Vista's  
8 construction loan to a business loan in the amount of  
9 \$2,332,278.81. The business loan did not require that Buena Vista  
10 attempt to sell the Villa Del Sol units, effectively allowing  
11 Buena Vista to change its development to that of a rental  
12 property.  
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14 To further mitigate losses, Buena Vista requested that the  
15 Bank write down its loan to \$1.8 million. The Bank refused.  
16 Buena Vista's efforts to refinance failed. In July, 2009, New  
17 Resource Bank sold the loan to Defendant Ferguson & Brewer  
18 Investment Company. Defendant Marcus & Millichap, a real estate  
19 investment firm, brokered the sale.  
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21 Buena Vista filed suit against Defendants alleging eight  
22 causes of action: (1) violation of the Racketeer Influenced and  
23 Corrupt Organizations (RICO) Act, (2) breach of contract,  
24 (3) breach of the implied covenant of good faith and fair dealing,  
25 (4) violation of California Business & Professions Code sections  
26 17200 et seq., (5) fraud, (6) unjust enrichment, (7) intentional  
27 interference with prospective economic advantage, and  
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1 (8) negligence. Defendants filed motions to dismiss under Federal  
2 Rule of Procedure 12(b)(6), which resulted in the dismissal of all  
3 eight causes of action with leave to amend. Subsequently, Buena  
4 Vista filed its First Amended Complaint (FAC). The amended  
5 complaint renews all eight causes of action, which Defendants now  
6 move to dismiss, again for failure to state a claim.

#### 7 8 LEGAL STANDARD

9 A complaint must contain a "short and plain statement of the  
10 claim showing that the pleader is entitled to relief." Fed. R.  
11 Civ. P. 8(a). On a motion to dismiss under Rule 12(b)(6) for  
12 failure to state a claim, dismissal is appropriate only when the  
13 complaint does not give the defendant fair notice of a legally  
14 cognizable claim and the grounds on which it rests. Bell Atlantic  
15 Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering  
16 whether the complaint is sufficient to state a claim, the court  
17 will take all material allegations as true and construe them in  
18 the light most favorable to the plaintiff. NL Indus., Inc. v.  
19 Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this  
20 principle is inapplicable to legal conclusions; "[t]hreadbare  
21 recitals of the elements of a cause of action, supported by mere  
22 conclusory statements," are not taken as true. Ashcroft v. Iqbal,  
23 \_\_\_\_ U.S. \_\_\_\_, 129 S. Ct. 1937, 1949-50 (2009) (citing Twombly, 550  
24 U.S. at 555).

## DISCUSSION

## I. RICO Claim

To state a claim for relief in a private RICO action, Buena Vista must allege four essential elements: (1) a pattern of racketeering activity, (2) the existence of an enterprise engaged in or affecting interstate or foreign commerce, (3) a nexus between the pattern of racketeering activity and the enterprise, and (4) an injury to its business or property by reason of the above. Sedima S.P.R.L. v. Imrex Company, 473 U.S. 479 (1985). As the predicate acts for its RICO claim, Buena Vista alleges mail and wire fraud by all three Defendants. "A wire fraud violation consists of (1) the formation of a scheme or artifice to defraud; (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." Mail fraud differs only in that it involves the use of the United States mails rather than wires. See 18 U.S.C. § 1341. All allegations of fraud under the RICO statute must be plead with particularity. Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989).

Buena Vista's original RICO claim failed for several reasons. First, Buena Vista did not identify any deceptive statements made by mail or by wire or how the fraud was furthered by particular mailings or telephone calls. Second, the claim failed to allege an interstate telephone call. See 18 U.S.C. § 1343 (criminalizing schemes to defraud "by means of wire, radio, or television

1 communication in interstate or foreign commerce . . ."); see also  
2 First Pacific Bancorp, Inc. v. Bro, 847 F.2d 542, 547 (9th Cir.  
3 1988) (holding that the "allegation of wire fraud is also  
4 unsupported, since there is no evidence of interstate wire  
5 communication."). Finally, Buena Vista failed sufficiently to  
6 allege a pattern of fraud.

7 Buena Vista's First Amended Complaint does not cure these  
8 defects. First, the amended complaint fails to allege with  
9 particularity an interstate telephone call made to further the  
10 purported fraud. Thus, Buena Vista's RICO claim against  
11 Defendants based on wire fraud fails again.

12 Instead, the amended complaint identifies various general  
13 misrepresentations that New Resource Bank allegedly sent by the  
14 United States mail. Buena Vista concedes that courts have  
15 "interpreted Rule 9(b) to mean that the pleader must state the  
16 time, place, and specific content of the false representations as  
17 well as the identities of the parties to the misrepresentation."  
18 Bosse v. Crowell Collier & MacMillan, 565 F.2d 602, 611 (9th Cir.  
19 1977). Its allegations, however, fail to identify any particular  
20 mailings or specific fraudulent statements. It is not clear how  
21 the mailings furthered the scheme to defraud Buena Vista. Many of  
22 Buena Vista's allegations set forth a time frame of more than a  
23 year during which the alleged unlawful mailing or mailings  
24 occurred. At best, a few allegations set forth the approximate  
25 month when a misrepresentation was made by mail. It is not  
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1 apparent from the complaint how the mailings were "integral" to  
2 the alleged scheme. United States v. Blecker, 657 F.2d 629, 637  
3 (4th Cir. 1981).

4       The First Amended Complaint fails to allege with specificity  
5 New Resource Bank's fraudulent scheme. Buena Vista alleges that  
6 it received "false information" from New Resource Bank "regarding  
7 the declining housing market and alternative refinancing/take-out  
8 loan options that would mitigate any housing decline." FAC ¶ 24.  
9 Buena Vista further contends that New Resource Bank  
10 "representatives, via U.S. Mail, on or about September 2006 and  
11 continuing throughout 2006 and 2007, falsely asserted and assured  
12 Buena Vista that a permanent financing solution would be available  
13 to Buena Vista and the Bank would facilitate permanent financing  
14 for rental property . . ." FAC ¶ 26. New Resource Bank also  
15 allegedly misrepresented that it "provided creative and  
16 alternative financing solutions to new entrepreneurs." FAC ¶ 28.  
17 These allegations do not disclose the parties to the  
18 communications, the specific false statements that addressed  
19 alternative refinancing, take-out loans, or permanent or creative  
20 financing options, or why these statements were false when made.

21       Further, Buena Vista's amended complaint fails to cure the  
22 deficiencies in its allegations of a pattern of fraud. Buena  
23 Vista has not alleged "closed-ended continuity" by asserting a  
24 series of related predicate acts that extended "over a substantial  
25 period of time" and threatened future criminal conduct. Turner v.

1 Cook, 362 F.3d 1219, 1229 (9th Cir. 2004). To the extent that  
2 Buena Vista alleges that New Resource Bank fraudulently induced it  
3 to enter into a loan agreement with the Bank, the  
4 misrepresentations occurred beginning in September, 2006, when  
5 Buena Vista first contacted New Resource Bank, FAC ¶ 70, through  
6 the time when Buena Vista executed the loan one month later, in  
7 October, 2006. FAC ¶ 92. "Predicate acts extending over a few  
8 weeks or months and threatening no future criminal conduct do not  
9 satisfy this requirement." Id. (citing H.J. Inc. v. Northwestern  
10 Bell Tel. Co., 492 U.S. 241 (1989)). According to Buena Vista, New  
11 Resource Bank's alleged misrepresentations after October, 2006  
12 were part of a single scheme to foreclose on Buena Vista's  
13 property. Buena Vista, however, does not satisfy the requirement  
14 of alleging a future threat because it admits that New Resource  
15 Bank sold the note to Defendant Ferguson & Brewer. FAC ¶¶ 14-15,  
16 205.

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19 Nor do Buena Vista's allegations establish a pattern of fraud  
20 through open-ended continuity. Buena Vista does not identify any  
21 other victims or threatened victims of the scheme. Instead, Buena  
22 Vista continues to rely on the fact that New Resource Bank  
23 stipulated to the issuance of a Cease and Desist Order by the  
24 Federal Deposit Insurance Corporation and the California  
25 Department of Financial Institutions, providing that it would  
26 manage its funds in a risk-averse manner. However, the order  
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1 relates to management and maintenance of capital issues, not to  
2 Buena Vista's allegations of fraud or predatory lending.

3 Buena Vista has failed to cure the deficiencies in its RICO  
4 claim against Defendant Marcus & Millichap as well. Buena Vista  
5 points to numerous paragraphs in its amended complaint, none of  
6 which identify any particular deceptive statements that were made  
7 by mail, or describe how the fraud was furthered by any particular  
8 mailings. Buena Vista's conclusory allegation that "Marcus, via  
9 U.S. Mail fraudulently disclosed Buena Vista and its owners'  
10 personal financial information to Defendant Ferguson," FAC ¶ 285,  
11 does not remedy the generalities in its original complaint.  
12 Further, Buena Vista has failed to allege a pattern of  
13 racketeering activity by Marcus & Millichap because the assertion  
14 that the pattern of illegal disclosures began over two years ago  
15 and continued from 2008 through 2009 does not satisfy the  
16 requirement to plead a "series of related predicates." Turner,  
17 362 F.3d at 1229. Legal conclusions are not taken as true.  
18 Iqbal, 129 S. Ct. at 1949-50.

19 Buena Vista's First Amended Complaint similarly fails to  
20 state a RICO claim against Defendant Ferguson & Brewer. Buena  
21 Vista alleges that Ferguson & Brewer refused to proceed with  
22 refinancing Buena Vista's loan after Ferguson & Brewer purchased  
23 the note, and that it received confidential financial information  
24 about Buena Vista and its owners from Defendant Marcus &  
25 Millichap. However, none of the allegations identifies with  
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1 particularity the fraud furthered by the mail. The repeated bare  
2 assertions that Ferguson & Brewer, New Resource Bank and Marcus &  
3 Millichap communicated by mail for the purpose of fraudulently  
4 taking Buena Vista's property and relaying confidential  
5 information is insufficient to allege acts of fraud and a pattern  
6 of racketeering.

7 Buena Vista's RICO claims against all three Defendants are  
8 dismissed.  
9

10 II. Breach of Contract against New Resource Bank

11 Buena Vista's amended complaint brings a claim for breach of  
12 contract against New Resource Bank alone. To assert a cause of  
13 action for breach of contract, a plaintiff must plead: (1) the  
14 existence of a contract; (2) the plaintiff's performance or excuse  
15 for non-performance; (3) the defendant's breach; and (4) damages  
16 to the plaintiff as a result of the breach. Armstrong Petrol.  
17 Corp. v. Tri-Valley Oil & Gas Co., 116 Cal. App. 4th 1375, 1391  
18 n.6 (2004).  
19

20 Buena Vista alleges that New Resource Bank breached oral and  
21 written agreements by failing to provide permanent financing,  
22 accurate "housing market climates," and a loan-to-value ratio of  
23 sixty-nine percent, and by "demanding more money for the interest  
24 reserve provision." In addition, Buena Vista contends that New  
25 Resource Bank breached a contract by failing properly to manage  
26 loan withdrawals, transition Buena Vista's loan to a rental  
27 property loan in a timely fashion, explore refinancing options,  
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1 and release the note at a reduced amount to a third party lender  
2 when Buena Vista sought to refinance, and by selling the note  
3 without warning or notification, adding terms to the second loan  
4 extension, and disclosing private and confidential information.  
5 These allegations mirror those made in Buena Vista's first  
6 complaint.

7  
8 Although the complaint refers to the original Construction  
9 Loan Agreement, the Business Loan Agreement, and the Promissory  
10 Note, as well as the two extensions to the construction loan, it  
11 does not identify written provisions that establish the  
12 obligations that New Resource Bank allegedly breached. New  
13 Resource Bank's motion to dismiss includes as exhibits the  
14 Construction Loan Agreement that Buena Vista entered into with the  
15 Bank on October 3, 2006, as well as the Business Loan Agreement  
16 and Promissory Note, both dated December 9, 2008.<sup>1</sup> With one  
17 exception, these documents do not provide evidence that New  
18 Resource Bank made the promises that Buena Vista has alleged.

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20 The provision relating to the "Disbursement of Loan Funds"  
21 indicates, "Unless waived by Lender in writing the ratio of the  
22 amount of the Loan to the Value of the Property as completed shall  
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24 <sup>1</sup> The Court considers these contracts on the motion to  
25 dismiss because their contents are alleged in the complaint and  
26 their authenticity is not disputed. Branch v. Tunnell, 14 F.3d  
27 449, 454 (9th Cir. 1994) (holding that courts may properly  
28 consider documents "whose contents are alleged in a complaint and  
whose authenticity no party questions, but which are not  
physically attached to the [plaintiff's] pleadings.").

1 not exceed 70.000%." It does not appear that the agreement  
2 required the Bank to maintain a ratio of sixty-nine percent, as  
3 Buena Vista's complaint alleges. "The Consent to Loan  
4 Participation" in the loan agreement permits disclosure of  
5 information to potential buyers and the sale of the note.

6 The Construction Loan Agreement does indicate that a fixed  
7 amount of money was to be set aside in an interest reserve  
8 account. The "Interest Reserve Provision" states,  
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10 The sum of \$225,000 shall be set aside within the  
11 Loan, sufficient to pay interest due on the Note. On  
12 the specified payment date, sufficient amounts shall  
13 be disbursed by Lender from the reserve sum and  
14 applied to the Interest payment then due. When said  
15 sum has been completely disbursed, Borrower shall make  
payments directly to Lender in accordance with the  
terms of this Note. Borrower may make any interest  
payment when due from its sources at any time during  
the term of the Note.

16 Buena Vista's amended complaint newly alleges that it paid an  
17 additional \$30,000 on or about May, 2007, after \$225,000 had been  
18 set aside as required by the agreement. Buena Vista paid this  
19 amount due to New Resource Bank's demands for "more money for the  
20 interest reserve provision." FAC ¶ 302. New Resource Bank  
21 threatened to pull funding from the construction project if it did  
22 not come forward with the additional amount. Buena Vista alleges  
23 that the \$30,000 payment depleted its cash reserves. These new  
24 allegations address the defects that the Court earlier identified  
25 by stating that Buena Vista paid the added amount, and it suffered  
26 negative consequences as a result.  
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1           However, Buena Vista has still failed to allege that the Bank  
2 breached the interest reserve provision by demanding the  
3 additional payment. While the provision indicates that \$225,000  
4 is the required amount "sufficient to pay interest due on the  
5 Note," the provision further states, "When said sum has been  
6 completely disbursed, Borrower shall make payments directly to  
7 Lender in accordance with the terms of this Note." The complaint  
8 simply alleges that \$30,000 was paid, but does not allege that the  
9 \$225,000 reserve had not been completely disbursed, or that  
10 additional interest was not due and required by the provision  
11 requiring direct payment to the Bank for interest due. Thus,  
12 Buena Vista has still failed to allege a breach of the contract by  
13 the demand for \$30,000 in interest payment.

15           Furthermore, Buena Vista has not plead damages based on  
16 breach of the interest reserve provision. Buena Vista was obliged  
17 to pay interest on the loan it received from New Resource Bank.  
18 There is no indication in the complaint that the additional  
19 \$30,000 did not go towards paying its interest obligation.

21           The written agreements do not contain New Resource Bank's  
22 supposed promises to provide permanent financing, accurate  
23 "housing climates," a timely conversion of the loan to financing  
24 for a rental property, or the release of the note at a reduced  
25 rate to a third party lender. Buena Vista contends that these  
26 promises were made orally before it entered into the Construction  
27 Loan Agreement. However, as the Court noted in its August 31,  
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1 2010 order dismissing Buena Vista's original breach of contract  
2 claims, the Construction Loan Agreement included an integration  
3 clause. The Business Loan Agreement and Promissory Note had  
4 similar clauses. "Terms set forth in a writing intended by the  
5 parties as a final expression of their agreement with respect to  
6 such terms as are included therein may not be contradicted by  
7 evidence of any prior agreement." Continental Airlines, Inc. v.  
8 McDonnell Douglas Corp., 216 Cal. App. 3d 388, 418 (1989) (citing  
9 Cal. Code of Civ. P. § 1856(a)). Thus, New Resource Bank's  
10 alleged oral promises related to the Construction Loan Agreement  
11 cannot form the basis for Buena Vista's breach of contract claims.

13 Buena Vista argues that the integration clauses are  
14 unenforceable because the loan agreements are voidable, in that  
15 they were secured through fraud and as a result of Buena Vista's  
16 inferior bargaining position. These arguments were unpersuasive  
17 when Buena Vista made them in its first opposition to Defendants'  
18 motion to dismiss, and there is no basis for the Court to change  
19 its decision. As explained above, Buena Vista has not alleged  
20 with sufficiently specificity any fraudulent statements that  
21 induced it to enter into the agreements with New Resource Bank.  
22 Thus, Buena Vista has failed to state a claim that its agreements  
23 with the Bank are void.  
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## 1 III. Claim for Breach of the Implied Covenant Against the Bank

2 Buena Vista's original claim for breach of the implied  
3 covenant of good faith and fair dealing against New Resource Bank  
4 failed because it did not concern the performance of the existing  
5 explicit contract terms.

6 "There is an implied covenant of good faith and fair dealing  
7 in every contract that neither party will do anything which will  
8 injure the right of the other to receive the benefits of the  
9 agreement." Kransco v. American Empire Surplus Lines Ins. Co., 23  
10 Cal. 4th 390, 400 (2000) (quoting Comunale v. Traders & General  
11 Ins. Co., 50 Cal. 2d 654, 658 (1958)). "The prerequisite for any  
12 action for breach of the implied covenant of good faith and fair  
13 dealing is the existence of a contractual relationship between the  
14 parties, since the covenant is an implied term in the contract."  
15 Smith v. City and County of San Francisco, 225 Cal. App. 3d 38, 49  
16 (1990).

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19 "The implied covenant of good faith and fair dealing is  
20 limited to assuring compliance with the express terms of the  
21 contract, and cannot be extended to create obligations not  
22 contemplated by the contract." Pasadena Live, LLC v. City of  
23 Pasadena, 114 Cal. App. 4th 1089, 1094 (2004). "This covenant  
24 only imposes upon each contracting party the duty to refrain from  
25 doing anything which would render performance of the contract  
26 impossible by any act of his own, but also the duty to do  
27 everything that the contract presupposes that he will do to  
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1 accomplish its purpose." Harm v. Frasher, 181 Cal. App. 2d 405,  
2 417 (1960).

3 Like its original claim, Buena Vista's implied covenant claim  
4 in its amended complaint is based on the same allegations as its  
5 breach of contract claim. To the extent that Buena Vista's  
6 renewed claim is based on breaches of oral agreements that Buena  
7 Vista purportedly had with New Resource Bank, the claim continues  
8 to concern the performance of contract terms that do not  
9 explicitly exist.  
10

11 IV. UCL Claims against all Defendants

12 California's Unfair Competition Law (UCL) prohibits any  
13 "unlawful, unfair or fraudulent business act or practice." Cal.  
14 Bus. & Prof. Code § 17200. The UCL incorporates other laws and  
15 treats violations of those laws as unlawful business practices  
16 independently actionable under state law. Chabner v. United Omaha  
17 Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of  
18 almost any federal, state or local law may serve as the basis for  
19 a UCL claim. Saunders v. Superior Court, 27 Cal. App. 4th 832,  
20 838-39 (1994). In addition, a business practice may be "unfair or  
21 fraudulent in violation of the UCL even if the practice does not  
22 violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798,  
23 827 (2003).  
24

25 Buena Vista continues to allege UCL claims under the  
26 unlawful, unfair, and fraudulent prongs against all three  
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1 Defendants. As before, Buena Vista's claim based on an unlawful  
2 business act fails because its RICO claims are deficient.

3 In regard to its UCL claim based on unfairness, Buena Vista  
4 is correct that it is not required to plead allegations that a  
5 business practice violated public policy. An unfair business  
6 practice occurs when the practice "'offends an established public  
7 policy or when the practice is immoral, unethical, oppressive,  
8 unscrupulous or substantially injurious to consumers.'" People v.  
9 Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509, 530  
10 (1984). Nevertheless, Buena Vista has failed to allege conduct  
11 that rises to this level. Though it has added numerous passages  
12 to the complaint, the conduct alleged is the same as that asserted  
13 in the original complaint. Even with the greater detail provided  
14 in the complaint, none of the acts alleged amounts to unscrupulous  
15 conduct.  
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17 Under the UCL, "a fraudulent business practice is one that is  
18 likely to deceive members of the public." Morgan & AT&T Wireless  
19 Svcs., Inc., 177 Cal. App. 4th 1235, 1254 (2009). Federal Rule of  
20 Civil Procedure Rule 9(b) requires that allegations of fraud be  
21 plead with particularity. As discussed in connection with its  
22 RICO claim above, Buena Vista's UCL fraud claim against New  
23 Resource Bank still suffers from insufficient particularity, which  
24 was the basis for the claim's previous dismissal. Buena Vista  
25 again relies on the Cease and Desist Letter but, as the Court  
26 noted earlier, the letter does not relate to the allegations of  
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1 fraud in the present case. The amended complaint is similarly  
2 devoid of any allegations of fraud by Marcus & Millichap or  
3 Ferguson & Brewer that deceived Buena Vista or would be likely to  
4 deceive the public.

5 The UCL claims against Defendants are dismissed.

6 V. Fraud Claims Against All Defendants

7 To state a claim for fraud, a plaintiff must plead  
8 "(a) misrepresentation; (b) knowledge of falsity (or scienter);  
9 (c) intent to defraud, i.e., to induce reliance; (d) justifiable  
10 reliance; and (e) resulting damage.'" In re Napster, Inc.  
11 Copyright Litig., 479 F.3d 1078, 1096 (9th Cir. 2007) (quoting  
12 Small v. Fritz Cos., Inc., 30 Cal. 4th 167, 173 (2003)); see  
13 generally Cal. Civ. Code §§ 1709-10. Averments of fraud "shall be  
14 stated with particularity." Fed. R. Civ. Proc. 9(b). The  
15 allegations must be "specific enough to give defendants notice of  
16 the particular misconduct which is alleged to constitute the fraud  
17 charged so that they can defend against the charge and not just  
18 deny that they have done anything wrong." Semegen v. Weidner, 780  
19 F.2d 727, 731 (9th Cir. 1985). Statements of the time, place and  
20 nature of the alleged fraudulent activities are sufficient, id. at  
21 735, provided the plaintiff sets forth "what is false or  
22 misleading about a statement, and why it is false." In re  
23 GlenFed, Inc. Secs. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994).

24 Buena Vista's prior claims for fraud against Defendants  
25 failed because it did not identify false representations that were  
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1 the basis for its claim that it was fraudulently induced to  
2 execute the loan. In its amended complaint, Buena Vista alters  
3 somewhat the misrepresentations that New Resource Bank purportedly  
4 made but still fails to plead with particularity the information  
5 necessary to give the Bank notice of why these statements were  
6 false when made. The fraud claim against Ferguson & Brewer is  
7 still not cognizable because Buena Vista has not alleged that the  
8 firm made any intentional misrepresentations concerning the  
9 original Construction Loan Agreement or anything else. Similarly,  
10 there is no viable fraud claim against Marcus & Millichap because  
11 merely labeling a disclosure fraudulent is not sufficient to plead  
12 a misrepresentation that induced Buena Vista to enter into an  
13 agreement with the Bank, or any other agreement.

14  
15 Buena Vista's fraud claims are dismissed.

16 VI. Unjust Enrichment Claim Against All Defendants

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18 Buena Vista has realleged its claims for unjust enrichment  
19 against all Defendants. The Court observed that, while it is not  
20 clear whether there exists an independent cause of action under  
21 California law for unjust enrichment, Buena Vista failed to state  
22 a basis for the restitutionary remedy.

23 As discussed above, Buena Vista has not alleged that the  
24 \$30,000 in interest payments it made to the Bank were not owed  
25 under the Note. Nor has Buena Vista alleged that Marcus &  
26 Millichap or Ferguson & Brewer obtained any money or other benefit  
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1 from Buena Vista. Buena Vista's claims for unjust enrichment  
2 against all Defendants are dismissed.

3 VII. Intentional Interference with Prospective Economic Advantage  
4 (IIPEA) against New Resource Bank

5 Buena Vista's renewed IIPEA claim against New Resource Bank  
6 fails for reasons similar to those explained in the Court's  
7 previous dismissal order. The amended complaint does not allege  
8 conduct by New Resource Bank that interfered with Buena Vista's  
9 prospective economic advantage. To state a claim for this tort,  
10 Buena Vista must show (1) an economic relationship between Buena  
11 Vista and a third party containing the probability of future  
12 economic benefit for Buena Vista; (2) New Resource Bank's  
13 knowledge of this relationship; (3) intentional acts by the Bank  
14 designed to disrupt the relationship; (4) actual disruption of the  
15 relationship; (5) damages proximately caused by the Bank's acts;  
16 and (6) that the Bank's acts were wrongful by some legal measure  
17 other than the fact of the interference itself. Korea Supply Co.  
18 v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153-54 (2003).  
19

20 The amended complaint adds the names of three financial  
21 institutions--Mechanics Bank, First Republic Bank, and Wells Fargo  
22 Bank--and alleges that they were likely to have offered  
23 refinancing to Buena Vista but, due to the Bank's interference,  
24 Buena Vista lost these critical business opportunities.  
25

26 According to the amended complaint, Wells Fargo and Mechanics  
27 Bank declined to refinance Buena Vista's loan after New Resource  
28

1 Bank refused to write down the loan to \$1.8 million. The loan  
2 agreement, however, did not require the reduction, and the refusal  
3 to write down the loan was not wrongful by any other legal  
4 measure. First Republic lost interest in refinancing after it  
5 learned of the FDIC's Order to Cease and Desist. This was not the  
6 result of intentional interference by New Resource Bank.

7  
8 In addition, Buena Vista alleges that New Resource Bank  
9 interfered with its relationship with the Reiser Group, the team  
10 hired to market its units as rentals. However, it appears from  
11 the complaint that the marketing team quit due to the lack of  
12 interest in Buena Vista's rental properties. Even if a delay by  
13 New Resource Bank in converting the loan to one for rental  
14 property slowed Buena Vista's entry into the rental market, such a  
15 delay would not constitute intentional interference because the  
16 loan agreement does not require conversion to a rental property  
17 loan, much less on a certain timetable. There is no independent  
18 legal basis to charge the Bank with wrong-doing.

19  
20 Buena Vista's IIPEA claim against New Resource Bank is  
21 dismissed.

22 VIII. Negligence Claim against New Resource Bank

23 The Court dismissed Buena Vista's claim for negligence  
24 against New Resource Bank in its original complaint because it  
25 failed to allege facts that established a duty of care. "[A]s a  
26 general rule, a financial institution owes no duty of care to a  
27 borrower when the institution's involvement in the loan  
28

1 transaction does not exceed the scope of its conventional role as  
2 a mere lender of money." Nymark v. Heart of Fed. Savings & Loan  
3 Assn., 231 Cal. App. 3d 1089, 1095 (1991).

4 In its amended complaint Buena Vista has alleged that the  
5 Bank "constantly scrutinized" its prices, sales strategies and  
6 marketing team, and "requested constant meetings with Buena  
7 Vista's sales team, progress updates, updates on potential sales  
8 offers and pressured Buena Vista to 'do whatever possible'" to  
9 sell units. Buena Vista asserts that in this way New Resource  
10 Bank assumed the role of an "investor/developer" giving rise to a  
11 duty of care sufficient to support a claim for negligence.

12 Buena Vista, however, points to no case law indicating that  
13 the conduct alleged exceeds the conventional role of a lender.  
14 Nymark and Connor v. Great Western Sav. & Loan Ass'n., 69 Cal. 2d  
15 850 (1968), are distinguishable. New Resource Bank's behavior  
16 reflected its concern about the viability of the development  
17 project it had financed. "[A] strong public policy exists, if our  
18 financial institutions are to remain solvent, to prevent a  
19 conventional money lender from having to insure [the success of  
20 every investment.]" Nymark, 69 Cal. 2d at 1099-1100 (quoting Fox  
21 & Caskadon Financial Corp. v. San Francisco Fed. Sav. & Loan  
22 Assn., 52 Cal. App. 3d 484, 489 (1975). Thus, without factual  
23 allegations establishing conduct by New Resource Bank that exceeds  
24 the role of a conventional lender, this claim must be dismissed.  
25 If the activities alleged were sufficient to trigger a duty of  
26  
27  
28

1 care, banks could not exercise due diligence in reviewing the  
2 status of their investments without exposing themselves to tort  
3 liability. Buena Vista's negligence claim is dismissed.

4  
5 CONCLUSION

6 The Court GRANTS Defendants' motions to dismiss with respect  
7 to all of Buena Vista's claims without leave to amend. Docket  
8 Nos. 46, 50 & 51. Buena Vista has previously been granted leave  
9 to amend and has failed to add the requisite factual allegations  
10 to its claims. Accordingly, dismissal without leave to amend  
11 further is warranted. See Zucco Partners, LLC, v. Digimarc Corp.,  
12 552 F.3d 981, 1007 (9th Cir. 2009).

13 IT IS SO ORDERED.

14 Dated: 1/26/2011

15   
16 CLAUDIA WILKEN  
17 United States District Judge